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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1061

*petition not
printed*

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*
GEORGE JOHNSON,

Petitioner,

against

JOHN F. FOSTER, as Warden of Auburn Prison, Auburn,
New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

✓ NATHANIEL L. GOLDSTEIN,
*Attorney General of the State
of New York,
Attorney for Respondent,
The Capitol,
Albany 1, New York.*

✓ WENDELL P. BROWN,
Solicitor General,

IRVING I. WAXMAN,
*Assistant Attorney General,
of Counsel.*



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INDEX.

SUBJECT INDEX.

	PAGE
Statement	1
Facts	2
The Issue	3
Preliminary Comment	3

POINT I

Habeas corpus is not petitioner's proper remedy herein	4
---	---

POINT II

Petitioner was informed of and waived his right to counsel	7
Conclusion	9

TABLE OF CASES CITED

<i>Dewey v. City of Des Moines</i> , 173 U. S. 193.....	4
<i>Hunter v. City of Pittsburgh</i> , 207 U. S. 161.....	4
<i>Johnson v. Zerbst</i> , 304 U. S. 458.....	7
<i>Matter of Lyons v. Goldstein</i> , 290 N. Y. 19.....	5, 6
<i>Matter of Morhous v. New York Supreme Court</i> , 293 N. Y. 131	5
<i>New York ex rel. Whitman v. Wilson</i> , 318 U. S. 688....	5
<i>People ex rel. Albanese v. Hunt</i> , 266 App. Div. 105, aff'd, 292 N. Y. 528.....	8
<i>People ex rel. Asaro v. Morhous</i> , 268 App. Div. 1016, app. dismiss., 294 N. Y. 694.....	8

II.

	PAGE
<i>People ex rel. Carr v. Martin</i> , 286 N. Y. 27.....	5, 6
<i>People ex rel. Martine v. Hunt</i> , 294 N. Y. 651.....	6
<i>People ex rel. Montagno v. Morhous</i> , 267 App. Div. 797, aff'd 292 N. Y. 678.....	8

STATUTES CITED

New York Civil Practice Act § 1231.....	5
28 United States Code § 344.....	4, 6

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**BRIEF IN OPPOSITION TO PETITION
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Statement

Petitioner prays for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, entered in the office of the Clerk thereof on the 3rd day of October, 1946 (R. 27), unanimously affirming an order of the Supreme Court of the State of New York entered in the office of the Clerk of Cayuga County on April 18, 1946 (R. 1), dismissing petitioner's writ of habeas corpus and remanding him to the custody of respondent as Warden of Auburn State Prison, Auburn, New York.

Applications for leave to appeal to the New York State Court of Appeals were denied by the Appellate Division of the Supreme Court, by order entered November 7, 1946, and by the Court of Appeals, by order entered December 3, 1946.

The only opinion herein was written by the trial judge, Mr. Justice Earle S. Warner of the New York Supreme Court. It is not reported but is printed at pages 23 to 26 of the record.

Facts

On March 28, 1939 petitioner was indicted by the grand jury of Herkimer County, New York, for the crime of forgery, second degree (R. 10). The indictment was transferred on March 31, 1939 from the Supreme Court to County Court for disposition (R. 17). On April 5, 1939 petitioner was arraigned before the County Court and pleaded guilty to the indictment charging forgery, second degree (R. 19-20), but on the following day he was rearraigned and was allowed to withdraw his plea of guilty and enter a plea of guilty to forgery, third degree, thereby permitting a much smaller mandatory sentence (R. 20, 19).

Thereafter the District Attorney filed an information against the petitioner pursuant to Section 1943 of the New York Penal Law, charging petitioner with having previously been convicted of the felony of attempted rape (R. 20, 21). Petitioner was arraigned on this information, admitted that he was the same person named therein, and was thereupon sentenced to a term of from five to ten years in State prison as a second offender (R. 20-21).

Petitioner was paroled from prison on August 18, 1942, declared delinquent on November 2, 1943, and was returned

to prison on December 21, 1944 (R. 16). He escaped from prison on May 20, 1945 and was reincarcerated on May 22, 1945 (R. 16). His term has not expired and he is still confined on the original sentence (R. 21).

The Issue

Petitioner has attacked the legality of his confinement on the ground that he was not accorded his constitutional right to be represented by counsel prior to his conviction. Petitioner further claims that even if he was actually given such an opportunity to be assisted by counsel, his illiteracy and general ignorance precluded any competent waiver of such right. This is the sole claim set forth in petitioner's "Specification of Errors" to this Court (Petition and Argument, pp. 6-7), and this was also the sole contention considered by the Appellate Division of the New York Supreme Court.

We argue that petitioner may not raise this issue in New York State by means of a writ of habeas corpus, aside from the fact that he actually was afforded an opportunity to be represented by counsel.

Preliminary Comment

In Point 3 of petitioner's "Reasons Relied on for the Allowance of the Writ," set forth on pages 7-8 of the "Petition and Argument" [hereinafter referred to as petitioner's brief], petitioner has injected a new allegation of error into the case with regard to the validity of a plea of guilt to the crime of forgery, third degree, under an indictment for forgery, second degree, and pages 18-26 of his brief are devoted to an argument in support of this contention. It is submitted that this Court should completely disregard this phase of petitioner's argument in view of the fact that

it was never presented to the courts below and is being raised for the first time in this Court (28 U. S. C. § 344; *Dewey v. City of Des Moines*, 173 U. S. 193, 196-200; *Hunter v. City of Pittsburgh*, 207 U. S. 161, 181).

Petitioner's original petition to the State Supreme Court for a writ of habeas corpus contained only two allegations of error: (1) That he was deprived of his right to counsel, and (2) that the information filed by the District Attorney charging petitioner to be a second offender was invalid (R. 8-9). The trial court rejected both of these contentions (R. 23). On appeal to the Appellate Division of the State Supreme Court, petitioner expressly abandoned his allegation with regard to the validity of the aforementioned information, relying solely on his claim relating to the deprivation of the right to counsel, and the Appellate Division also rejected this contention. Thus, as the only question ever considered by the Appellate Division of the State Supreme Court, or by the State Court of Appeals in the application for leave to appeal, was whether petitioner was deprived of his constitutional right to be represented by counsel, it must follow that this Court is without jurisdiction to pass upon the legality of petitioner's plea of guilty, which issue is being raised for the first time upon this application for a writ of certiorari. In view of this fact, the merits of petitioner's claim regarding his plea of guilty to forgery, third degree, under an indictment for forgery, second degree, will not be discussed in this brief.

POINT I

Habeas corpus is not petitioner's proper remedy herein.

Inasmuch as petitioner's contention that he was denied his right to counsel cannot be raised in New York State on a writ of habeas corpus, petitioner has misconceived his

proper remedy in the case at bar. Thus, as was said by Mr. Justice Frankfurter in the case of *New York ex rel. Whitman v. Wilson*, 318 U. S. 688, at page 692:

“The merits of petitioner’s constitutional claim have therefore never been passed on by, because never presented in an appropriate proceeding to, the highest available New York court. Consequently, it cannot be entertained here. Since petitioner has misconceived the mode by which his constitutional claim may properly be brought before the New York courts, this petition should be dismissed.”

Section 1231 of the New York Civil Practice Act expressly provides that a person is not entitled to a writ of habeas corpus in any case “Where he has been committed or is detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction.”

The New York Court of Appeals has interpreted this statute and discussed its application in detail in its recent decisions in the cases of *Matter of Morhous v. New York Supreme Court*, 293 N. Y. 131 (1944); *Matter of Lyons v. Goldstein*, 290 N. Y. 19 (1943); and *People ex rel. Carr v. Martin*, 286 N. Y. 27 (1941). These cases clearly enunciate the rule in New York State regarding the use of writs of habeas corpus.

The *Morhous* case arose under a writ of habeas corpus wherein the relator attacked the legality of his confinement on the ground that his conviction was based on perjured testimony so as to constitute a violation of the due process clause of the Federal Constitution. The State Court of Appeals held that such a contention could not be raised on a writ of habeas corpus in New York as the relator was being held under a final judgment of a court of competent jurisdiction, and stated that relator’s proper remedy was by writ of error *coram nobis* to the original sentencing court to correct its own judgment, if errone-

ous. In so holding, the Court of Appeals stated (p. 140):

“Controverted questions of fact whether the relator is deprived of his liberty without due process can be determined only by a motion to vacate the judgment made in the court which granted it. The Supreme Court of this State has not jurisdiction to determine that question upon a writ of habeas corpus.”

The *Lyons* and *Carr* cases, cited above, are to the same effect. In the *Carr* case, the Court of Appeals further remarked (p. 36):

“In no case has a writ of habeas corpus been sustained by this court where imprisonment is under a final judgment of imprisonment by a court having jurisdiction of the person of the accused and general jurisdiction of criminal offenses.”

Inasmuch as the petitioner in the present case is being held under a final judgment of the Herkimer County Court, and that Court had jurisdiction of the person of petitioner as well as general jurisdiction of criminal offenses, any attack which petitioner now wishes to make concerning the procedure followed at his trial must be raised by a writ of error *coram nobis* and cannot be considered on a writ of habeas corpus. The New York Court of Appeals has specifically held that an assertion that a person has been deprived of his constitutional rights on the ground that he was not informed of his right to counsel cannot be raised upon a writ of habeas corpus (*People ex rel. Martine v. Hunt*, 294 N. Y. 651 [1945]).

As petitioner has misconceived his proper remedy and the State courts have thereby not been given an opportunity to pass upon the merits of his contention, this Court is without jurisdiction to entertain petitioner's request for a writ of certiorari and his petition should be dismissed (28 U. S. C. § 344).

POINT II

Petitioner was informed of and effectively waived his right to counsel.

Petitioner's brief is devoted almost entirely to a discussion of the importance of the constitutional guarantee to an accused of the right to be represented by counsel. In this respect, we are in complete agreement with petitioner that the guarantee of the right to counsel should be vigorously protected and enforced. But we maintain that the petitioner in the case at bar was fully accorded this right to be represented by counsel and he effectively waived it.

Although the record does not specifically disclose what occurred prior to petitioner's conviction with regard to this question, at the hearing on this writ an affidavit of Hon. Frank H. Shall, the present District Attorney of Herkimer County, who was the County Judge who presided at petitioner's arraignment, was received in evidence. In this affidavit, set forth on pages 18-19 of the record, Judge Shall states that upon the arraignment of petitioner before him on April 5, 1939, he expressly asked petitioner if he desired an attorney to represent him and petitioner stated that he did not wish one. That this did transpire is further supported by the statement contained in the minutes of the Herkimer County Court that the defendants (petitioner and another) were jointly indicted and "Neither have counsel and neither ask for any to be assigned" (R. 19). As was held by the trial judge in this case at the hearing on the writ of habeas corpus below, it may reasonably be inferred from this notation alone that petitioner was advised of his right to counsel (R. 25).

In the case of *Johnson v. Zerbst*, 304 U. S. 458, this Court held that the right to counsel may be waived, and

the Court there reiterated the doctrine of the presumption of regularity which, in like manner, is applicable here (pp. 467-9):

“When this right is properly waived, the assistance of counsel is no longer a necessary element of the court’s jurisdiction to proceed to conviction and sentence. * * * It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel.”

The New York rule regarding the presumption of regularity is the same (*People ex rel. Albanese v. Hunt*, 266 App. Div. 105, 108, aff’d, 292 N. Y. 528 [1944]). Mere unsupported assertions by a relator are insufficient to rebut this presumption (*People ex rel. Asaro v. Morhous*, 268 App. Div. 1016, app. dismissed, 294 N. Y. 694 [1945]; *People ex rel. Montagno v. Morhous*, 267 App. Div. 797, aff’d, 292 N. Y. 678 [1944]).

Petitioner’s allegation that he did not possess sufficient intelligence to waive competently his right to counsel is not consistent with the manner in which the record and brief before this Court herein have been prepared. Petitioner is, and at the time of his conviction was, a man of at least ordinary intelligence; had he been a mental defective, it is reasonable to assume that he would have been committed to a State institution for delinquent mental defectives, rather than to a State prison.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be dismissed.

Dated: March 14, 1947.

NATHANIEL L. GOLDSTEIN,
*Attorney General of the State
of New York,*
Attorney for Respondent,
The Capitol,
Albany 1, New York.

WENDELL P. BROWN,
Solicitor General,

IRVING I. WAXMAN,
*Assistant Attorney General,
of Counsel.*